SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 792

SAUL I. BIRNBAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF, *AMICUS CURIAE*, SUBMITTED, WITH THE CONSENT OF THE SOLICITOR GENERAL, IN SUPPORT OF THE ABOVE-CITED PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On December 3, 1968, Saul I. Birnbaum (Birnbaum) petitioned this Court to issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit entered October 4, 1968 in a consolidated appeal entitled *United States of America, Appellee,* v. *Saul I. Birnbaum, Appellant* (Docket Nos. 32063-32064).

With leave of the District Court and the Court of Appeals, St. Augustine's Episcopal School, The United Cerebral Palsy Association of Nassau County, Inc., The Hillel School of the Shore Area, Pride of Judea and The Brooklyn Philharmonia, Inc., appeared below *amicus curiae* in support of Birnbaum's application and appeal. With

the consent of the Solicitor General of the United States, they file this brief, *amicus curiae,* in support of Birnbaum's aforesaid petition.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit was issued on October 4, 1968, but is as yet unreported. It is annexed to the Birnbaum petition as Appendix A. The orders of the United States District Court for the Southern District of New York dated (1) December 6, 1967, denying Birnbaum's motion to reduce and suspend sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure, (2) January 4, 1968, adhering to the decision embodied in the earlier order, and (3) January 27, 1968, denying an order to show cause why a writ of *coram nobis* or in the nature of *coram nobis* should not be granted, are contained in the record certified to this Court and are set forth at pages A-12 to A-13 of Appendix A to the Birnbaum petition.

Jurisdiction

The judgment of the Court of Appeals was entered on October 4, 1968. On October 23, 1968, Mr. Justice Harlan granted Birnbaum an extension to December 3, 1968, of his time to file his petition. This brief is filed with the consent of the Solicitor General of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Are a defendant's constitutional rights violated, or are the standards established by this Court under its supervisory powers to assure the fair administration of justice violated:

(1) where probation was conditionally promised by the trial court at the time of sentencing if the defendant embarked upon a specified program and where that judicial promise was not kept although the defendant complied in every respect with the trial court's edict respecting such program, and such compliance has never been challenged; and

(2) where such sentence in the circumstances of this case offends "civilized standards of procedure" and principles of the "fair administration of justice" in that (i) a defendant is, by the prospect of avoiding possible imprisonment, improperly enticed into embarking upon an extra-judicial course which he has no legal obligation to pursue and (ii) substantial and responsible segments of the community are, by the inducement that they can thereby advance the public interest in the rehabilitation of criminal offenders, invited by the Court into joining in such program, only to find that, though rehabilitation has been effected, the promise is not to be fulfilled for reasons never specified, thereby compromising the integrity of the judicial process.

Constitutional Provisions, Statutes and Rules Involved

Involved here are the Fifth, Sixth and Eighth Amendments to the Constitution of the United States; 18 U. S. C. §4208(b), 72 Stat. 845; and Rule 35 of the Federal Rules of Criminal Procedure, the texts of which are set forth in the Appendix to the Birnbaum petition to this Court. Additionally, there is involved the supervisory authority of this Court over the administration of justice in the federal courts.

Statement

Six charitable, social service and civic organizations appear *amicus curiae* in support of the Birnbaum petition. They do so because the trial court (United States District Court Judge Irving Ben Cooper) by its sentence of Birnbaum invited them to become the vehicle for Birnbaum's rehabilitation. As found by the Court of Appeals, the charities were, by Judge Cooper's statements at sentencing and his subsequent actions, led to believe that probation was promised, if not already conditionally granted, provided only that the rehabilitation program proved successful (A-8, esp. n. 5*). The standard established by Judge Cooper to measure the success of the program was expressly stated to be a showing that Birnbaum had realigned his sights and devoutly wished to give a hunk of himself and of his wealth to doing with constancy those acts which would help his fellow Americans and at the same time enhance his personal well being immeasurably (A-3). Against

* References preceded by "A-" are to pages of Appendix A to the Birnbaum petition, at which pages is set forth the opinion of the Court of Appeals.

that standard, the charities, in recognition of their responsibility to society, initiated the program. They involved Birnbaum in their activities and as increasingly he demonstrated by his deeds that he devoutly wished to meet the court's standards his responsibilities were enlarged, as was the charities' reliance upon him in the discharge of their functions. He gave of his wealth in full measure. We are not here, however, simply because by so doing he met that standard set by the court. Neither are we here because for more than eighteen months he has given so fully of his time, effort, energy and imagination, although in so doing he has far exceeded that standard set by the court. We appear as *amicus curiae* because by his deeds Birnbaum has to this day continued to demonstrate that he is prepared with constancy to perform, as he has performed, those acts which will really help his fellow Americans and thereby enhance his own well being immeasurably. We appear as *amicus curiae* because we know from continuing experiences over an eighteen month period that Birnbaum has, indeed, realigned his sights and because we are confident that he will continue to act as a useful and constructive member of society not merely during the term of his promised probation but for the remainder of his life.

By every objective criterion, Birnbaum has merited the promised probation held out to him by the trial court. By every objective criterion, Birnbaum has merited the confidence of the charities as spokesman for society and they, in turn, have the duty to remind the Court, if reminder be necessary, that even handed justice compels that the promise of probation made to the charities and to Birnbaum now be honored. In so doing the charities do not urge that Birnbaum escape punishment for the crime of which he stands convicted. Rather, they urge that the punish-

ment be that which the trial court found at sentencing to be appropriate under all the circumstances, namely the promised probation.

A. *The Circumstances Giving Rise to This Proceeding.*

1. The Court's involvement of the charities in its program to rehabilitate Birnbaum.

The charities first became involved with Birnbaum and with these proceedings in May, 1966.* New York State Supreme Court Justice Louis B. Heller, long a leader in the civic and community life of New York, then approached United Cerebral Palsy Association, Brotherhood-In-Action and Menorah Home & Hospital for the Aged and advised them fully of the circumstances of Birnbaum's conviction and of the precise text of Judge Cooper's statements at sentencing. Specifically he called to their attention Judge Cooper's remarks at sentencing that Birnbaum had "not accepted the jury's verdict and faced up to its import"; that he protested his "innocence" and was "on the way to appeal"; that Judge Cooper had expressly stated that in his opinion Birnbaum clearly was not "a callous, insensitive human, one totally devoid of decent behavior"; that "I [Judge Cooper] do not regard you as beyond recall"; that Birnbaum certainly was not "beyond rehabilitation"; but that, in view of his pending appeal, "now is not the time to explore that phase". Justice Heller called to the charities' attention and they expressly recall then noting Judge Cooper's ruling at sentencing that "[f]or the present, then, in the light of your f[r]ame of mind, let me just add that if your conviction is sustained, this Court

* All of the factual statements herein were found, without challenge, to be correct by the Courts below and, indeed, they were incorporated in substantial part in the opinion of the Court of Appeals.

might, and I emphasize might, upon an impressively convincing showing that you have realized, or rather realigned, your sights and devoutly wish to give a hunk of yourself as well as your wealth to doing with constancy those acts which will really help your fellow Americans and at the same time enhance you[r] personal well being immeasurably, I say this Court might consider . . . a program of rehabilitation without confinement as provided for by 18 United States Code, Section 3651." Alternatively, and "for all these reasons", a one year term of confinement would issue.

Justice Heller told the charities that following sentencing he had met with Judge Cooper, that at Judge Cooper's suggestion he had agreed to act as Birnbaum's "unofficial probation officer" * and that the two Judges had agreed on a basic pattern for Birnbaum's rehabilitation along the lines proposed by Judge Cooper at the sentencing. Justice Heller added that, subject to the approval of those organizations, he and Judge Cooper had agreed that Brotherhood-In-Action, United Cerebral Palsy and Menorah Home & Hospital for the Aged were appropriate organizations in

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* In the sentencing statement Judge Cooper had referred to Justice Heller as one who had faith in Birnbaum and seemed genuinely concerned about his fate. Birnbaum, accordingly, went promptly after sentencing to Justice Heller to seek his advice as to how best to comply with the course thus charted by Judge Cooper.

After reviewing the minutes of sentencing, Justice Heller, in turn met with Judge Cooper (with whom he had served on the New York City Court of Special Sessions), and pointed out to him that Birnbaum felt he required guidance in determining the means for complying with Judge Cooper's directive. Judge Cooper then told Justice Heller:

> "Well, if he doesn't know, why don't you guide him? You have had a great deal of experience in charitable endeavors. So why don't you act as his unofficial probation officer and show him the ropes."

Justice Heller agreed to act in that capacity.

whose programs and activities Birnbaum should become involved.

Against that background, Justice Heller specifically inquired whether, in light of those facts and particularly Judge Cooper's promised rehabilitation-probation program, the charities would accept Birnbaum's involvement in their activities.

Following that report and inquiry, each of the charities separately conducted lengthy personal interviews with Birnbaum to determine, in the words of Presiding Justice George Beldock of the Appellate Division of the New York State Supreme Court and founder of Brotherhood-in-Action, "whether he [Birnbaum] could fit into the structure of 'rehabilitation' so poignantly expressed at the time of sentence." (See Appendix F hereto). The organizations then agreed to accept Birnbaum and to involve him in their activities, relying upon Judge Cooper's statements at sentencing. The organizations agreed thus to participate because they viewed it to be their responsibility to the Courts and society to partake in, as viewed by Justice Beldock, an approach that was "a pioneering, novel and humane one—truly in the best tradition of our new concept of sentencing psychology."

St. Augustine's Episcopal School in the Bedford-Stuyvesant section of Brooklyn, Pride of Judea, Hillel School and the Brooklyn Philharmonia became involved with Birnbaum and these proceedings under slightly different circumstances. At or about the time Justice Heller was meeting with the group of charities he and Judge Cooper had agreed to invite to participate in Birnbaum's rehabilitation, Birnbaum sought out for himself these four additional organizations, thereby to demonstrate that he approached

the opportunity offered him by Judge Cooper as a serious, full-time and meaningful path to achieve the rehabilitation which Judge Cooper had prescribed. Those organizations were similarly advised of Judge Cooper's sentencing statements, the charted program of rehabilitation-probation and, based thereon and following lengthy interviews with Birnbaum, they too agreed to involve Birnbaum in their activities. As hereinafter more fully appears, Justice Heller was advised by Birnbaum of the additional activities he had thus undertaken and Justice Heller reported thereon and secured approval thereof from Judge Cooper.

2. The Rehabilitation-Probation Program. Having thus committed themselves to become the vehicles for Birnbaum's rehabilitation, the organizations assigned to him specific and, from their viewpoint, important tasks. They did so, as observed by Justice Beldock on behalf of Brotherhood-In-Action, against the background that the course charted by Judge Cooper "presented somewhat of a challenge for me, for our cause and for society in general."

The tasks assigned Birnbaum were many, varied and time consuming, involving, over a period of some 18 months, an average of two to three full working days each week. Additionally, Birnbaum contributed $85,000 to the various organizations, pledging an additional $25,000 to help meet their pressing needs.*

(a) *United Cerebral Palsy Association of Nassau County.* This organization provides teaching, rehabilitation and medical services to Cerebral Palsy sufferers.

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* Although not before this Court on this record, Birnbaum has continued to give a major portion of his time, effort and imagination to these charities, as well as significant additional sums of money.

Birnbaum's activities while undergoing "rehabilitation" through the aegis of the Association were, as appears from Appendix A hereto, of such magnitude that they merited his election as a Director of the Association with full knowledge of all concerned as to the circumstances of his involvement. Such activities were reported to Judge Cooper in a letter addressed to him under date of December 22, 1967, by Dr. Sidney Marks, Executive Director of the Association (Appendix A hereto), a portion of which appears below*:

"...

"Saul Birnbaum for more than a year has deeply involved himself in our efforts in behalf of cerebral palsied children and adults. *Your admonition to Mr. Birnbaum—opening, as it did, new and to him unknown vistas of communal service—initiated a program of rehabilitation for Mr. Birnbaum so effective, imaginative and novel that it has commanded the respect and enthusiastic endorsement of those of us who have come to know of it.*

It is my sincere belief that the whole of the story of Mr. Birnbaum's communal efforts have not been told to your Honor. *I, for instance, know that no one has ever approached me nor anyone at the Center, to learn from us those facts which I am sure your Honor would want to know about Saul Birnbaum's endeavors during the past year or more; the knowledge of which*

* Each of letters from the several charitable and social services organizations referred to herein were directed to Judge Cooper following his peremptory decision of December 6, 1967 that the sentence of imprisonment be executed forthwith, and in connection with the unsuccessful motion for reconsideration thereof. As herein more fully appears, none of the organizations had then, or at any subsequent point in time, been contacted by the official Court probation officer to whom Birnbaum had reported, nor, despite their request therefor, were they ever afforded the opportunity to report orally and in detail to the Court upon the rehabilitation program in which they had thus become involved by the actions of the Court.

facts I am sure your Honor would consider important in the making of a determination.

You have provided living proof, Sir, that there are no obstacles which cannot be overcome to restore a person as a resource to the community. I most respectfully urge you to reconsider your most recent decision [and] to permit the continuation of Mr. Birnbaum's rehabilitation process, to his and the community's immeasurable benefit. I ask your Honor to consider what Saul Birnbaum has already done and can do, for us.

No consideration of the effectiveness and the wisdom of your Honor's prescription for rehabilitation can be complete unless it includes our experience with Mr. Birnbaum at Cerebral Palsy. With his guidance, through his foresight, imagination, and because of his deep concern with our problem, we are moving toward our goal when the handicapped and their families will have been relieved of one of the greatest sources of their anguish.

When Saul Birnbaum first came to our center, he met many of the parents whose daily lives are affected by the pain and the suffering of their cerebral palsied children. Birnbaum spoke to these parents, and quickly recognized that the heaviness of their hearts and their day-to-day anguish, however, terrible, was less than their overwhelming concern for the future of their handicapped children. Somehow, they felt, they could cope with the present, and so long as they lived, somehow provide for the care of their youngsters. But they are overwhelmed by the contemplation of the future. Too often we hear the heartbreaking question, 'What will happen to our children when we are gone? Who will take care of them?' The brutal fact is, Judge Cooper, that nowhere is there a full-time residential care facility for the cerebral palsied.

Saul immediately suggested, fully committed, and pledged himself to the establishment of a full-time residential and treatment center for palsied orphans. At

once he set in motion the machinery to plan and build the necessary residential center for these tragedy-stricken people. He has devoted countless hours to this task. The program embraces a new center that will provide for the social, medical and rehabilitative needs of the palsied. So diligent has his work on this experimental program been, that we are already close to the start of construction.

We sincerely believe that this center will be a model for the entire country. For the first time, the multi-handicapped will face the future without fear of total abandonment.

In addition to the residential center, Saul has devoted considerable time to the expansion of our medical wing. Cur Medical Center is a key portion of our facilities. We are planning a major expansion of this medical wing, with provisions for added staff and patients.

Despite the many problems and tensions of this past year, we have made significant advance in the area of attaining financial security. Much of this progress has been a result of Saul Birnbaum's direct efforts. His studies of the problem and his recommendations have proven invaluable. The demands upon Saul's time have been great; there have been frustrating and innumerable committee meetings, phone calls and conferences, which only a charity can command and the charitably-inclined can provide. Saul Birnbaum has given unstintingly of himself in this endeavor. He assumed the chairmanship of our Journal, which has just come to a successful conclusion. The funds raised through his efforts are making it more possible for us to do our job at Cerebral Palsy.

I am sure that when your Honor reviews Birnbaum's massive effort in our behalf—the establishment of the residential center, expansion of our Medical Wing, creation of a program for endowment funds, and his contribution of time and money to help

solve our financial problems, you will agree with me that Mr. Birnbaum is a man not only of ability, but of true compassion and dedication.

It would be impossible for me to recount all that Saul Birnbaum has meant to us. The road, of our cerebral palsied and their families, is a long and hard one to travel, but the goal makes the difficult journey worth while. I most sincerely ask that you help us by exercising your judicial power with compassion, and permit Saul Birnbaum to *continue* his good work with us." (Emphasis supplied).

(b) *St. Augustine's Episcopal School,* this well-known institution, located in the heart of the Bedford-Stuyvesant section of Brooklyn, educates more than 300 Negro children drawn primarily from one of the nation's most critical poverty areas. There, Birnbaum helped in the development of curriculum and community service programs, aided in the reorganization of its school camp facilities, pioneered in the development of an intensive remedial reading program and played the primary role in the maintenance and expansion of the school's facilities. Because of his labors and merit and with full knowledge of his background and the circumstances under which he became involved in the works of St. Augustine's, Birnbaum was designated a member of the School's Board of Advisors, serving on that Board with the Brooklyn District Attorney and an Assistant Secretary of State of the United States. More importantly, Birnbaum merited by his deeds the designation as St. Augustine's "Man of the Year" for 1967, a particular honor for a white man in a black community at a time when Bedford-Stuyvesant, like other ghetto communities, was torn by racial strife. The children of St. Augustine's were so advised (*infra,* p. 22) and they in turn conveyed the message of hope to others in their community. Attached hereto

as Appendix B is a copy of a letter written on December 21, 1967, by Father Jacobs, the Principal of St. Augustine's, to Judge Cooper reporting on the rehabilitation of Birnbaum and his continuing involvement in and importance to St. Augustine's and those it serves.*

(c) *Hillel School.* At the Hillel School, an institution designed to provide a thorough Jewish education combined with a full program of secular studies, Birnbaum reorganized the school's financial structure, led efforts to meet the school's increasing enrollment, acted as Chairman of its Endowment and Development Fund Program, assisted in the construction of additional classroom facilities and secured the development of a scholarship program to which he made significant contributions. His devotion, interest and industry led to his knowing election to the School's Board of Directors. Attached hereto as Appendix C is a copy of the letter written to Judge Cooper on December 22, 1967, by Rabbi Morris Schmidman, Dean of the Hillel School.

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* As we have previously observed, each of the charities, by reason of the trial court's promise and Birnbaum's meaningful efforts, immersed him deeply in their activities and increasingly relied upon him. That Birnbaum became and is a mainstay of the charities is illustrated by the following excerpts from Father Jacob's above-mentioned letter to Judge Cooper:

> "... We wanted you to know that we are distraught over the decision [to now imprison Birnbaum despite his rehabilitation and the promised probation] and are praying that he may be spared to continue his work. We are so desperately in need of his advice and assistance: If we do not now conclude the transaction for our new building, we will forever lose the opportunity. We rely so heavily on Saul.
>
> If you send him to prison, our school plans will collapse. Our fond hope of many years will again become a frustrating hope instead of a reality."

Birnbaum has to this day continued to aid St. Augustine's in its efforts to provide both the facilities and the teaching tools to meet the ever-increasing educational needs of the Bedford-Stuyvesant community.

(d) *Pride of Judea.* This organization is one designed to meet urgent community needs in the areas of child and family welfare, particularly in connection with emotionally disturbed children. As soon as Birnbaum had been accepted to become involved in the works of Pride of Judea, the President of that organization, Judge Maurice Bernhardt of the New York State Family Court, designated Birnbaum to its Professional Services Committee and assigned him the responsibility for development of a coordinating council of all agencies providing assistance to emotionally disturbed and retarded children. His efforts also included the financing and establishment of a clinic for the treatment of a condition known as "school phobia", a clinic which seeks to provide corrective treatment for emotionally disturbed children and to condition them for their return to the public school system. Birnbaum's many contributions to this organization were recognized by the designation of the special classes for "school phobia" in his honor, his being designated as guest of honor for one of its major affairs and the suggestion by the Board of Directors that he be a 1967 medal recipient. Attached hereto as Appendix D is a copy of Judge Bernhardt's written report to Judge Cooper, dated December 22, 1967, detailing Birnbaum's continuing and massive efforts on behalf of Pride of Judea under the rehabilitation program and Judge Bernhardt's views on the success thereof from the viewpoint of society and Birnbaum. As stated by Judge Bernhardt:

> "With Mr. Birnbaum, it has been my experience that no task is ever too small or too great for him to tackle and he has devoted a major portion of his time to us on a continuous basis. Our organization's outstanding men and women, have great regard for Mr. Birnbaum and find him almost indispensable as a leader and supporter of our very important service.

It would indeed be a tragedy for our children if Mr. Birnbaum's efforts were interrupted. His confinement would remove one of our most ardent supporters and deal a terrible blow to our programs. I do not refer to Mr. Birnbaum's financial generosity alone. I refer to his active participation, guidance and wisdom in helping us plan for the future."

(e) *Menorah Home & Hospital for the Aged.* Through its Brooklyn Center, this organization provides services to the aged and offers housing and hospital facilities, psychiatric training and service programs. Following initial indoctrination in the works of the institution by Justice Heller, Birnbaum was assigned, among other functions, overall fund-raising responsibilities and, through stint of effort, Birnbaum raised three-fold the sum previously secured. Birnbaum's knowledge and technical ability in the nursing home field, as well as his expertise in the areas of finance and administration, were employed by him on Menorah's behalf as part of the continuing rehabilitation-probation program. Attached as Appendix E hereto is a copy of the written report made to Judge Cooper, on December 23, 1967, by Arthur Gottlieb, Vice President of Menorah.

(f) *The Brooklyn Philharmonia, Inc.* is devoted to the cultural development of underprivileged children. Shortly after his introduction to its activities, Birnbaum sponsored, planned and financially supported a concert for 1,500 underprivileged children. His significant contributions in terms of time, effort and moneys—including the development of a program contemplating free music instruction for talented but underprivileged children—was recognized by his appointment as a Director of the organization.

(g) *Brotherhood-in-Action.* As previously observed this organization was founded over a quarter century ago by

Justice Beldock to foster, through various concrete programs, means for dealing with racial, religious and intergroup tensions, and their underlying causes. Birnbaum actively participated in the organization's work toward development of low cost housing.

Perhaps the best summary of how the rehabilitation-probation program came to be initiated, the understanding of the participants that it was a judicially sanctioned program and that all of the participants therein clearly believed it had been successfully conducted from the viewpoint of society as a whole, is stated in the letter written, on November 13, 1967, to Judge Cooper by Justice Beldock, a copy of which letter is annexed hereto as Appendix F. As stated by Justice Beldock, an esteemed jurist and humanitarian:

> "His [Birnbaum's] deep interest in our programs and his willingness to serve and to contribute of his time, effort and resources have been most gratifying. Having observed his selfless zeal in our work and the sincere manner of his conduct and his endeavor to serve his fellow man, I venture to predict that if permitted he will continue throughout his lifetime to take this type of genuine interest in causes such as ours, and others, which seek to alleviate the suffering, the impoverished, the underprivileged and the disadvantaged in our communities and in the nation."

3. The "Unofficial Probation Officer's" Report. The foregoing discussion merely capsulizes the many, varied and critically important efforts, in terms of time, imagination and effort, expended by Birnbaum over a period of 18 months as part of the program launched by Judge Cooper. On the average of several times a month, Birnbaum reported to Justice Heller upon his activities, keeping him apprised of his efforts to comply with Judge Cooper's directive.

After the commencement of the program outlined above, Justice Heller again met with Judge Cooper and reported in substance: "As the unofficial probation officer of Birnbaum, I would like to inform you that Birnbaum has become actively and financially identified with the three organizations we talked about and [is] putting his heart and soul into all their activities." Justice Heller also advised Judge Cooper of Birnbaum's further efforts to discharge the mandate by involving himself wholeheartedly with further charitable activities through the vehicle of St. Augustine's and the other above-mentioned organizations, to the extent that he had become a mainstay of each of those organizations. Judge Cooper replied: "That's good, that's fine."

On November 13, 1967, Justice Heller wrote to Judge Cooper as follows:

> "I respectfully submit this letter in the hope that it will be of assistance to you in connection with the defendant's present application before you [Birnbaum's first application for reduction in sentence pursuant to Rule 35 of the Fed. Rules of Crim. Proc.].
>
> I am familiar with the statements made by you at the time the defendant was sentenced. Mindful of the perceptive and wise remarks you then uttered, I undertook, as a friend, to help guide the defendant toward a path of service and dedication to the community and his fellow man. I introduced him to the leaders of three (3) outstanding communal and charitable endeavors, but not without first explaining to these men the nature of his conviction, and of your statement. These gentlemen, after meeting and talking with him at great length on several occasions, eventually agreed to invite him to participate in the charitable activities with which they were identified.
>
> I know that Judge Rifkind will explain in detail Birnbaum's work with these organizations as well as

other charities with which he became associated on his own. I might add that this was the only extent of my participation in this rather unusual experience at helping rehabilitate a man whose life in the past (as you so properly assessed it) had been involved solely with making money.

In carefully reviewing the whole picture, I am convinced that he has undertaken, and is indeed accomplishing, a remarkable job. If permitted to continue with these involvements, he should prove a useful, dedicated and humanitarian servant of our society.

. . . [quoted textual matter omitted]

In summary, I would say that the defendant's activities, since he was sentenced, clearly indicate a genuine attempt on his part to rehabilitate himself along the lines suggested. You will have before you sufficient 'predictive data' to guide you in your difficult decision. I bespeak for the defendant your gifted *intuition, insight and imagination* in evaluating the redemptive qualities now no longer 'latent' but patently observable in the activities of the defendant, and I urge you to consider suspending his sentence."

4. The Second Circuit Decision Affirming the Conviction. While the above-mentioned program of rehabilitation and "probation" of Birnbaum in conjunction with the charitable and social service organizations was in progress, Birnbaum proceeded to perfect his appeal, as Judge Cooper knew he would. David W. Peck, formerly Presiding Justice of the Appellate Division of the New York State Supreme Court and formerly President of the State Bar Association, represented Birnbaum. As detailed in the Birnbaum petition (Pet. p. 11*), Mr. Peck vigorously

* References preceded by "Pet." are to pages of the Birnbaum petition to this Court. Mr. Peck charged that Judge Cooper had "turned advocate for the prosecution" and he characterized the charge to the jury as "egregiously unbalanced", "pious in expression

challenged Judge Cooper's conduct of the trial. On February 10, 1967, some 10 months after commencement of the probation-rehabilitation program, the Second Circuit affirmed Birnbaum's conviction, Chief Judge Lumbard dissenting and charging that the trial judge had, as charged by Mr. Peck, abused his power, had stepped out of his role as the trial judge and had been carried away by his advocacy and made arguments which went beyond those of the prosecution. *United States* v. *Birnbaum,* 373 F.2d 250, 265, 268-69. (2d Cir. 1964)*

5. The Proceedings to Reduce Sentence and Confirm Probation. Following the denial of certiorari, 389 U.S. 837 (1967), Birnbaum moved, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, to reduce and suspend the sentence based upon his total compliance with the program charted by Judge Cooper. Despite their requests therefor, the charitable, civic and social service organizations in whose activities Birnbaum had become involved were denied the opportunity to be heard orally or to be interviewed by the probation officer of the Court. However, as previously observed, upon reargument of the Rule 35 application each of the organizations advised Judge Cooper in writing that, pursuant to the program he had initiated, they had involved Birnbaum fully and deeply in their ac-

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and pernicious in emphasis", "virulently prejudicial", "obviously improper and prejudicial", "calamitous" and "grievously wrong". Mr. Peck maintained further that Judge Cooper "took off in extemperaneous expression, gesturing and raising his voice as he did", that the charge contained "the vice of barbed implication" and that one particular aspect of the charge—when Judge Cooper gave his own "suggestion" that defendant "was up to his ears in graft and corruption"—could scarcely have been worse", "[y]et, if possible, the court made it worse . . . ."

* Even the majority was constrained to observe that "we might not have expressed ourselves or ordered our charge as did the trial judge", *supra,* 373 F.2d 250, 265.

tivities, that he had zealously pursued the tasks assigned him (and then some) and that in their view the goal sought to be achieved—rehabilitation—had been realized.

The showing thus made that Birnbaum had in fact "realigned his sights" and had "given a hunk" of himself and of his wealth "to doing with constancy those acts" prescribed by the Court was not and has never been rebutted or challenged. The Government opposed the application, however, on the ground that had Birnbaum continued to refuse to admit his guilt, emphasizing that Birnbaum's failure (as demonstrated by the appellate arguments of his counsel) to appreciate the way the judge had conducted the trial evidenced his bad character. Without explanation, Judge Cooper directed forthwith execution of the sentence, ignoring entirely the promised probation and expressly omitting to find at any time that the rehabilitation and probation process he had initiated, and Birnbaum's conduct in connection therewith, had in any way failed to meet the mark.

From that determination Birnbaum sought review in the District Court for the Southern District of New York by way of motion for a writ of error coram nobis, or in the nature of coram nobis. The charitable and social service agencies sought and were granted leave to intervene in that proceeding and to submit a petition and memorandum, *amicus curiae,* in support of Birnbaum's application. They did so not only because they are and were mindful of Birnbaum's efforts on behalf of the youth, the aged and infirm which those organizations serve and which have come to depend upon Birnbaum, but, more importantly, because they believed that the public interest was grievously affected where, as here, an injustice had been worked, to them, to a society which has been asked to accept and to aid in programs of rehabilitation of

criminal offenders, and to the integrity of the judicial process. Thus, as stated in the petition filed in the District Court by Father Jacobs, the Principal of St. Augustine's Episcopal School:

> "It is our view that Judge Cooper's determination works an injustice not only upon Birnbaum, but impunes the integrity of the Court, undermines confidence in the judicial process and does irreparable harm to the children, the aged, the underprivileged and the infirm for whom Birnbaum labored under the auspices of Judge Cooper. To illustrate, Saul I. Birnbaum merited by his deeds the designation as St. Augustine's 'Man of the Year' for 1967 and the children of St. Augustine's were so advised and they, in turn, doubtless conveyed that message to others in the Bedford-Stuyvesant community. At a time when the President of the United States, the Attorney General, the Judiciary and others cry out for respect for the law, is it not truly a tragedy for us to be compelled now to tell our children that the 'Man of the Year' of 1967 must go to jail because the Court has arbitrarily and capriciously reneged upon its promise and direction.
>
> To some it may sound trite to say that 'The true administration of justice is the firmest pillar of democracy.' To the youth, to the aged and to the infirm who have been and are being immeasurably helped by Saul Birnbaum's efforts that statement still has meaning. We seek leave to appear *amicus curiae* because it is our fundamental goal to continue to give meaning to that phrase."

On January 27, 1968, District Judge Inzer B. Wyatt denied Birnbaum's application for the issuance of a writ of error coram nobis, holding that there was "nothing that I can see that I can properly do" and that "this may be an instance to illustrate the desirability of appellate review of criminal sentences."

Birnbaum appealed from that decision. The several charitable and social service organizations sought and were granted leave by the Court of Appeals to intervene *amicus curiae*. Eight months after argument of the appeal the Court of Appeals affirmed, observing, *inter alia*:

> "The question before us for decision is not whether this court or another sentencing judge might have reacted differently to the request for modification of the sentence. Absent an abuse of discretion, Judge Cooper's determination must stand and cannot be disturbed on appeal." (A-11)

B. *The Issues Presented Meriting the Grant of Certiorari.*

From the viewpoint of the charities our grievance is not with the mere form of the sentence. Rather our complaint is directed to the propriety of the totality of circumstances of this case, commencing with the form of the sentence, then to the affirmative burden it imposed upon the defendant, then to the conditional promise it contained and, finally, to the circumstances under which that promise was dishonored. In their totality such circumstances challenge the integrity of the judicial process. Taken separately, they are both invalid and inherently unfair. Such invalidity and unfairness prejudiced not only the defendant but the charities who, by the Court's actions, became inexorably intertwined therein. By the Court's actions the charities were asked to and did become the vehicle for a Court-sanctioned program of rehabilitation —probation. They accepted Birnbaum, as they were invited to do, they involved him deeply in their activities and programs and they came to rely upon him; all the while believing that if they succeeded in affecting his rehabilitation formal probation would follow. Rehabilitation was affected, but without rhyme or reason the promise was not honored.

In searching for an explanation for what has here transpired we have looked first for some legal basis to sustain the trial court's actions and, as appears below, it is lacking. We then have looked for some equitable basis and it too is lacking. The inescapable conclusion to which we then are forced is that the totality of circumstances mandates invocation of the supervisory power of this court to secure the even-handed justice which here was lacking. *Saldana* v. *United States*, 365 U.S. 646, 647 (1961).

1. *In each of their component parts the sentence and the trial court's actions in connection therewith were invalid and in conflict with prior decisions of this Court and other Circuits.* Initially, this case raises fundamental questions respecting criminal sentence; its office, its form, its very nature, its relationship to the right of counsel adequately to represent a criminal defendant, its use to affect the inherent right of appellate review and, necessarily, the public interest in the integrity of the judicial process. In their resolution of such questions the Courts below have reached conclusions which on several separate grounds are directly at variance with prior decisions of this Court,* the Courts of other Circuits**, the Fifth and

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* See esp. *United States* v. *Behrens*, 375 U.S. 162 (1963); *Corey* v. *United States*, 375 U.S. 169 (1963). It should also be noted that this case presents the other facet of an issue as to which this Court recently granted certiorari because of the importance of the question thus presented. *North Carolina* v. *Pearce*, 397 F.2d 253 (4th Cir. 1968) *cert. granted* October 29, 1968 (No. 413, Oct. Term, 1968).

** See esp. *Patton* v. *State of North Carolina*, 381 Fed. 636 (4th Cir. 1967), *cert. denied* 390 U.S. 905 (1968); *Marano* v. *United States*, 374 F.2d 583 (1st Cir. 1967); *Thomas* v. *United States*, 368 F.2d 941 (5th Cir. 1966); *Butler* v. *District of Columbia*, 346 F.2d 798 (D.C. Cir. 1965); *United States* v. *Wiley*, 267 F.2d 453 (7th Cir. 1959) and 278 F.2d 500 (7th Cir. 1960).

Sixth Amendments to the Constitution of the United States, and the "fundamental principles of fairness" which, when violated, compel invocation of the supervisory power of this Court to assure the fair administration of justice.*

Thus premised, the effects that flowed from such sentence were equally tainted and, as hereinafter more fully appears, in conflict with numerous decisions of other Circuits. To illustrate, the sentence here imposed by its terms invited a defendant faced with imprisonment to undertake (as found by the Court of Appeals) a "calculated risk" that by embarking upon a course he otherwise had no legal obligation to pursue—a program under which, while on bail pending determination of his appeal, he would give a "hunk of himself and of his wealth" to specified charities--he might thereby, if his appeal proved unsuccessful, avoid imprisonment**; the program judicially prescribed though seemingly specific as to its terms was, as events demonstrated, to be judged by the sentencing court against such wholly subjective and undisclosed standards as to be capricious†; the vagaries of the subjective standards thus utilized permitted, if not compelled, the sentencing court to judge compliance based not merely upon the defendant's actions under the program but by the vigor with which his counsel pressed the inherent right of appellate review and the critical comments of the appellate court; and, finally, the Court enticed a number of highly reputable charitable and social service organizations to

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* See *Saldana* v. *United States, supra,* 365 U.S. 646, 647; *Yates* v. *United States,* 356 U.S. 363, 366 (1958); *Fay* v. *People of State of New York,* 332 U.S. 261, 287 (1947); *McNabb* v. *United States,* 318 U.S. 332, 341, 349 (1943).

** See *Thomas* v. *United States, supra; United States* v. *Wiley, supra.*

† See *Butler* v. *District of Columbia, supra.*

join in the charted program of rehabilitation and "probation" in the clearly proper but, nonetheless, misleading expectation that if the program were successfully undertaken it would be continued.

Manifestly, the vices of such sentencing—sentencing that is invalid both in its inception and in its resultant effects—are many, affecting the rights of defendants, the administration of justice and the public interest. Birnbaum's petition to this Court demonstrates the respects in which such sentencing adversely and improperly affects the rights of criminal defendants. Our concern is not so limited. "Our concern", in the words of Justice Frankfurter, "is with the fair administration of justice" (*Offutt* v. *United States*, 348 U.S. 11, 17 (1954)) and here the reason for concern stems from the fact that if the public is to be involved in obviously desirable programs of rehabilitation of criminal offenders* (or for that matter in any other judicially sanctioned programs) it clearly is entitled to scrupulously fair and candid treatment, particularly from the courts.

Here, such scrupulously fair treatment was lacking. As found by the Court of Appeals (A-8, esp. N. 5) the charities were led to believe and believed that the trial court had initiated a program under which the charities were to

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* As recently observed by the Advisory Committee on Sentencing And Review, "sentences which do not involve imprisonment are more likely to be effective in the vast majority of cases", as well as less expensive, and thus are to be preferred. *ABA Project on Minimum Standards for Criminal Justice, Advisory Committee on Sentencing and Review, Standards Relating to Sentencing Alternatives and Procedures*, Section 2.3(e), pp. 72-73 (1967). See also Herlands, *When and How Should a Sentencing Judge Use Probation*, 35 F.R.D. 487, 497 (1964). Public involvement in the sponsorship, and certainly in the support, of such programs of rehabilitation and probation is plainly critical, particularly if, as recommended, such programs are to be the rule rather than the exception.

supervise the rehabilitation of Birnbaum and, if such rehabilitation efforts were successful, probation rather than imprisonment would follow. That such was not a naive and untutored viewpoint is demonstrated by the fact that three experienced jurists—Justices Beldock, Heller and Bernhardt—reached the same conclusion. At no point in these proceedings has anyone, least of all the trial court, properly found that Birnbaum failed to meet the mark set for him by Judge Cooper or that he failed in any proper manner to realign his sights. If left thus misled, the charities, and we submit the public generally, will be compelled to conclude that they have been ill-used and that the integrity of the judicial promise and process is, to say the least, suspect.

(a) *The invalid nature and form of the sentence.* The Birnbaum petition to this Court sets forth in detail (Pet. 17-35) and we shall not repeat the arguments there made that tentative sentences are invalid, except where the Court expressly invokes 18 U.S.C. §4208(b) with its attendant safeguards. *United States* v. *Behrens,* 375 U.S. 162, 165 (1963); *Corey* v. *United States,* 375 U.S. 169, 173 (1963).

The Court of Appeals found that the "for the present" sentence here imposed was a tentative one, holding that under the terms of the sentence ". . . Judge Cooper unambiguously reserved the power to reassess the situation and decide whether, after Birnbaum's conviction had become final, probation would be inappropriate in light of all relevant factors, including that of appellant's behavior while his appeal was pending" (A-9). Such tentative sentence failed, however, to accord Birnbaum the option, necessarily inherent in 4208(b) sentences, to appeal either following the tentative sentence or after the entry of the final sentence. That omission not only violated the prin-

ciples enunciated in *Behrens* and *Corey*, it was the vice from which were spawned the injustices which bring us here.

By its terms the sentence compelled Birnbaum to appeal forthwith and simultaneously to embark upon the rehabilitation-probation course charted by the court. To illustrate, the trial court advised Birnbaum that it would not finalize probation until after (1) he had successfully embarked upon the charted rehabilitation program and (2) the appeal had been determined. Similarly the program was not in any way limited as to its duration, except by the action of the Court of Appeals in determining the appeal. Moreover, as found by the Court of Appeals, the trial court by its sentence gave, Birnbaum, as it gave to the charities (including the three above-mentioned jurists), the firm impression that should he appeal and should that appeal prove unavailing, he nonetheless need not face imprisonment if he pursued the specified path.

Here, then, there was imposed precisely the kind of unlawful tentative sentence—one free of any safeguards—abjured by this Court in *Behrens* and *Corey*. Thus, the defendant was placed in an untenable position in his pursuit of appellate review. If, as here, he pursued vigorously his inherent right of review, the actions of his counsel and of the appellate court would necessarily have an effect upon the trial court at the time of final sentence should the appeal fail*. Alternatively, the defendant and his counsel

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* As held by this Court in *Corey*, the option as to when to appeal from a tentative sentence under 18 U.S.C. §1408(b) finds justification in the fact that if the defendant were compelled to appeal forthwith, he "might think, rightly or wrongly, that the trial courts knowledge that an appeal had already been taken might adversely influence the court's discretion in imposing final sentence." 375 U.S. at 175.

could mute their advocacy on appeal, thereby prejudicing the appeal while preserving the "favor" of the trial court. As appears from the arguments set forth in the Birnbaum petition to this Court, which we will not repeat, such a dilemma may not properly be posed, for to do so would inhibit both the unfettered right of appellate review* and would make a mockery of the right to counsel on appeal.**

It is, of course, true that the technical arguments set forth above relate in substantial part to the validity of the sentence from the viewpoint of Birnbaum. However, in light of the predicament in which the charities have here found themselves, we feel obliged to point out these infirmities in the public interest lest they be permitted again to occur. Moreover, although the charities benefited tangibly from Birnbaum's time and efforts (and they, in turn, flowed from the sentence) such benefits pale in significance when compared with the harm that has here been done; harm to the administration of justice and the public interest. The charities (and their constituencies, vast segments of which are aware of what has here transpired) have, with reason, now come to suspect the sanctity of the judicial promise and even the integrity of the judicial process. To them sentencing is not a game and the judicial promise (even a

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* See *North Carolina* v. *Pearce*, 397 F.2d 253 (4th Cir. 1968) *cert. granted* Oct. 29, 1968 (No. 413, Oct. Term 1968); *Patton* v. *North Carolina*, 381 F.2d 636 (4th Cir. 1967); *Morano* v. *United States*, 374 F.2d 583 (1st Cir. 1967). Those cases, including *Pearce* which now is before this Court, hold that the right of appellate review shall not be hampered by the possibility that a *successful* appeal may result in an increased sentence on remand. This case, of course, poses the same question in respect of an *unsuccessful* appeal.

** See *Douglas* v. *California*, 372 U.S. 353 (1963). Obviously, the right to counsel on appeal is meaningless if such counsel is to be shackled in his advocacy by being barred from vigorously asserting any claim, however helpful to his client, that *may* displease the trial judge.

conditional one) is not to be viewed as a "calculated risk" with the prospect that it will be measured by the morals of the marketplace—perhaps honored, perhaps not. Hence our deep concern with what has here transpired, in all of its aspects, and our comment thereon as *amicus curiae.*

(b) *The resultant effects of such sentence.* It is, perhaps, not surprising that with an invalid sentence as the predicate, the events that followed were equally tainted.

First, at a time when Birnbaum would have been free to pursue whatever course he chose, while on bail pending appeal (Fed. Rules of Crim. Proc., Rules 38(b), 46), that freedom here became the subject of restraint. Birnbaum was, in the words of the Court of Appeals, offered a "faint glimmer of hope" that by undertaking a "calculated risk" he might "persuade the sentencing judge that he should not suffer confinement." (A-9, 10). Even if viewed in the light thus suggested by the Court of Appeals, the fact remains that Birnbaum had no choice, bearing in mind "[t]he unequal position of the judge and the accused, one with the power to commit to prison and the other determined to avoid prison . . ." *United States* v. *Gilligan,* 256 F.Supp. 244, 254 (S.D.N.Y. 1966). See *Worcester* v. *Commissioner of Internal Revenue,* 370 F.2d 713, 718 (1st Cir. 1966). Thus viewed, Birnbaum was enticed to embark upon a program under which, by the giving of a "hunk of himself and of his wealth" to charity, he might in the eyes of the Court then be entitled to probation. However, if thus viewed, the decisions below conflict with the holdings of other Circuits that the discretionary sentencing power of the trial court, howsoever sought to be justified, may not be used as a way to pressure a defendant to follow a certain course of action by punishing him with a more severe sentence if he does not. *Thomas* v. *United States,* 368 F.2d 941 (5th Cir. 1966);

United States v. *Wiley,* 278 F.2d 500 (7th Cir. 1960). Here that course of action was a program under which defendant would give a "hunk of himself and of his wealth" to specified charities and the alternative would be the trial court's refusal to consider the availability of probation, even though it had already found the defendant a fit subject for such rehabilitation. Additionally, the decisions below if thus viewed conflict with the holding of the Seventh Circuit that such pre-conditions upon judicial consideration of the availability of probation are invalid. *United States* v. *Wiley,* 267 F.2d 453 (7th Cir. 1959).

The prejudice incurred by Birnbaum by reason of a sentence that was invalid in inception and in pursuing the course there charted by the trial court could only be justified (if at all justifiable) upon either of two grounds. First, as we suggested below, the circumstances taken as a whole might be viewed as probation, for indeed there were here present, insofar as Birnbaum and the charities were concerned, all of the indicia of probation.* Second, it might be viewed as a conditional prom-

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* In the proceedings below we urged that, in practical effect, Birnbaum had been placed on probation at the time of and by virtue of the sentence. That view, as found by the Court of Appeals, was the one the charities (and the experienced jurists who acted for them) had held from the outset of the program. The Probation Act is, of course, a remedial statute and must be liberally construed. *E.g.: Scalia* v. *United States,* 62 F.2d 220, 223 (1st Cir. 1932); *Reeves* v. *United States,* 35 F.2d 323, 325 (8th Cir. 1929); *Nix* v. *James,* 7 F.2d 590, 592 (9th Cir. 1925). Liberal construction of the Probation Act permits the status of probation to exist under the Act even though the technical requirements of the Act have not been met. *E.g.: McHugh* v. *United States,* 230 F.2d 252 (1st Cir. 1956), *cert. denied* 351 U.S. 966-76; *Campbell* v. *Alderhold,* 36 F.2d 366 (N.D. Ga., 1929). Although all of the technicalities of the Act have not here been met, the statements made by the Court at sentencing and thereafter amounted to an invocation of the Act. Thus, in every practical respect, the relationship of the Court to Birnbaum since sentencing met or surpassed the qualifications of proba-

ise on the part of the Court that if Birnbaum successfully pursued the path of rehabilitation he would be placed on

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tion as established by the Act. First, the Court approved a particular course of action for Birnbaum to follow and led him to believe that if he followed that course he would not be required to go to prison to serve out his sentence. Second, the Court used the power given it by the Act to force Birnbaum to adopt a stated course of conduct; by emphasizing its power to send Birnbaum to prison on the one hand or, to give him liberty on the other, the Court was able to dictate Birnbaum's conduct for upwards of eighteen months. Third, Birnbaum was under the same pressures and restrictions that he would have been under had an official probation order issued; there was no doubt that the simple choice was to follow the charted course or face the prospect of imprisonment. Fourth, Birnbaum's activities were supervised by an officer of the judicial system (albeit a judge rather than a court probation officer) who in turn maintained contact with the defendant and the sentencing court, and, in addition, by seven responsible public agencies (two of whom supervised Birnbaum's activities through the eyes of judges who also were, to say the least, experienced and expert). Fifth, the conditions imposed on Birnbaum were not only affirmative, but of immense proportions. Certainly such conditions exceeded the norm (e.g., refrain from further violations of law, work regularly, behave); they called for specific conduct in terms of time, effort and monetary expenditures. The only missing ingredient for formal probation thus was a formal court order. However, as *McHugh* and *Campbell* make clear, such an order is not indispensable, it can be provided *nunc pro tunc*. See also *United States* v. *Mulligan*, 48 F.2d 93, 94 (2d Cir. 1931); *Buhler* v. *Pescor*, 63 F. Supp. 632, 638 (W.D. Mo. 1945); *Archer* v. *Snook* (N.D. Ga. 1926). *Cf.*, *United States* v. *Morse*, 344 F.2d 27, 29 n. 1 (4th Cir. 1965).

A fortiori, if probation was in effect it could not be revoked under the Act absent a clear showing that the conditions prescribed had been violated. *Hollandsworth* v. *United States*, 34 F.2d 423, 428 (4th Cir. 1929). See also *Broadus* v. *United States*, 317 F.2d 212, 213 (5th Cir. 1963); *Yates* v. *United States*, 308 F.2d 737, 739 (10th Cir. 1962). Here no one has contended, nor could they, that any such violation occurred. Of course, probation is in itself a form of punishment. *E.g.: Toyosaburo Korematsu* v. *United States*, 319 U.S. 432, 434-35, 63 S. Ct. 1124, 87 L. Ed. 1497, 1498-99 (1943). Neither the charities nor even Birnbaum urge that he escape punishment. Rather, they here seek, as they sought below, that the punishment fixed be that specified at sentencing—probation.

probation should his appeal fail.* Howsoever viewed, the indisputable fact remains (as found by the Court of Appeals) that the trial court knowingly permitted (if not encouraged) the charities to embark with Birnbaum upon the program of rehabilitation and the charities were led to believe and believed that, if that program were successful in terms of rehabilitating Birnbaum, probation would either be finalized or formalized. Again, those were not merely the judgments of persons unskilled in the law; included were the judgments of three experienced jurists based upon the statements made by the trial court at the time of and following sentencing.

Second, having thus initiated a program of rehabilitation (whether one of probation or one intended to satisfy conditionally promised probation) even-handed justice dic-

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* Any other construction would place the trial court in an unthinkable posture. Thus, it could not fairly be suggested that the course outlined at sentencing was a judicially meaningless one, except that it might be "good for Birnbaum's soul". Such an approach would violate the proscription of Canon 21 of the Canons of Judicial Ethics, that: " . . . Though vested with discretion in the imposition of mild or severe sentencing he [, the Judge,] should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence". *Cf. Weems* v. *United States,* 217 U.S. 349 (1909). Neither can it be suggested that the course outlined amounted, at best, to a "faint glimmer of hope", a "calculated risk" on the part of Birnbaum that, following determination of the appeal, Judge Cooper, who (in the words of the Court of Appeals) had "unambiguously reserved the power to reassess the situation", might or might not in imposing final sentence then grant probation. All of the evils of tentative sentencing would then be magnified. The trial court would thereby be imposing an unwarranted and inappropriate condition upon the grant of probation. *United States* v. *Wiley,* 267 F.2d 453, 455 (7th Cir. 1959). *Cf. Due Process in Sentencing,* 81 Harvard Law Rev. 821, 843 (1968). Moreover, if thus viewed, the trial court would have been engaging in the same kind of subjective sentencing as was found to be without basis in law in *Butler* v. *District of Columbia,* 346 F.2d 798 (D.C. Cir. 1965).

tated that the trial court either grant probation upon completion of the program or clearly state a proper basis for not doing so. Neither event here occurred.

The record discloses that in decreeing imprisonment rather than probation (both on the original application for the reduction of sentence and upon reargument) Judge Cooper denied the application of the charities to be heard orally, that they were never interviewed or in any way contacted by the court's probation officer and that Birnbaum, himself, was denied the opportunity for allocution. Nonetheless, the record is clear (and undisputed) that Birnbaum's rehabilitation was a success in precisely the terms specified by the court and that he had realigned his sights. The record also discloses that the government, although opposing probation and arguing for imprisonment, never challenged the merits or success of the rehabilitation program; rather it confined itself to the fact that the arguments of Birnbaum's counsel upon appeal evidenced Birnbaum's bad character and his unappreciativeness of the opportunity afforded him by the Court. No finding was at any time made by Judge Cooper that Birnbaum had failed to meet the mark set for him, or the respects in which he had thus failed. Judge Cooper simply held that, after due deliberation, he felt that Birnbaum should be imprisoned.

In light of the circumstance of this case, such action is, we submit, a denial of due process (*Due Process in Sentencing, supra,* 81 *Harvard Law Rev.* at 845) or, at least, a violation of the standards for the fair administration of justice sufficient to call for the invocation of the supervisory power of this Court. Manifestly, unless the defendant understands the nature of and reasons for the sentence which he is about to serve it has little useful impact upon him and

consequently leads only to cynicism. *ABA Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures, supra* at pp. 270-272; *Due Process in Sentencing, supra,* 81 *Harvard Law Rev.* at 843-44. Furthermore, where as here, the public has been invited to join the Court in the sponsorship of a program of rehabilitation, it is, at the very least, entitled to the scrupulously fair treatment and candor of such findings.*

As stated in the reports which the charities gave to Justice Heller and which he transmitted to Judge Cooper and as stated in the writings from the charities to Judge Cooper, it was and is the unanimous view of the charities that Birnbaum met the mark set for him (and then some), that he realigned his sights and that the rehabilitation program was a complete success. No one has ever disputed that showing, because they could not do so. *A fortiori* Judge Cooper's actions must have been based upon some event or consideration other than that which he outlined in his sentence and which served as the basis for the charities undertaking the role they did. If that undisclosed event or subjective consideration related to the circumstances

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* Indeed, that such lack of findings is not merely a disservice to the criminal defendant and to the public generally, but is also a distinct disservice to the judicial system is readily illustrated here. In the proceedings, arguments and decisions below, counsel and the courts were compelled to engage in conjecture in an effort to explain the actions of the trial court. Thus, the Court of Appeals was compelled to speculate that, although "Birnbaum may indeed have devoted much time and effort and have contributed large sums to charities", "[i]t *appeared* that in the judge's eyes appellant did not make 'the impressively convincing showing' that the Judge felt was necessary before he could grant probation" and that "the Judge did not *seem to feel* that the best interest of the public would be served by granting appellant probation". (A. 9, 10). Manifestly a record which compels resort to such conjecture is not merely inappropriate, it offends "civilized standards of procedure". *Cf. McNabb* v. *United States,* 318 U.S. 332, 340 (1943).

surrounding Birnbaum's appeal, then, as more fully appears from Birnbaum's petition to this Court, it is a patently improper consideration. If that subjective consideration transcended the normal and proper bounds of rehabilitation (which normal and proper bounds here were met), then, like all such wholly subjective standards, it is without basis in law. *Butler* v. *District of Columbia,* 346 F.2d 798 (D.C. Cir. 1965). Whatever undisclosed consideration may here have influenced the trial court's actions, the fact remains that those entrusted with the administration of that charted program unanimously viewed it to have been successfully complied with and no contrary showing has ever been made.

2. *Viewed as a whole, the sentence and the events flowing therefrom were not merely violative of provisions of law, they violated elementary principles of even-handed justice.* In the foregoing discussion we have focused briefly on particular aspects of the sentence which, to our mind at least, raise serious questions as to the essential validity of the sentence and the events it set into motion. However, as we previously observed our concern is not with the form of the sentence; it is instead with the totality of the circumstances of this case. As we view it, albeit in retrospect, the circumstances of sentencing were legally tainted from start to finish. What emerges, nonetheless, is that a distinct promise was here conveyed not merely to Birnbaum, but to those who by the trial court's actions were invited to lend themselves to aid in affecting the court's stated desire to secure the rehabilitation of Birnbaum. It is, in the final analysis, that notion of judicial commitment to formally place Birnbaum on probation (if what the court asked be done was in fact done) that we seek here to have honored.

Under circumstances such as here obtained the public, if not Birnbaum, is plainly entitled to enforce the sanctity of the judicial promise and the inviolate nature of elemental standards of judicial fairness. See e.g. *Machibroda* v. *United States,* 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed. 2d 483 (1962); *Shelton* v. *United States,* 356 U.S. 26, 78 S. Ct. 563, 2 L.Ed. 2d 579 (1958); *Walker* v. *Johnston,* 312 U.S. 275, 61 S.Ct. 574, 85 L. Ed. 830 (1940); *United States* v. *Taylor,* 303 F.2d 165 (5th Cir. 1962); *People* v. *Price,* 24 Ill. App. 2d 364, 164 N.E. 2d 528 (Ill. App. 1960); *Weber* v. *State,* 58 Ohio St. 616, 51 N.E. 116 (Ohio Sup. Ct. 1898).* As stated by the Supreme Court of Utah:

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* The Court of Appeals rejected the concept of conditional promise upon two grounds. First, it concluded that "[a] careful reading of Judge Cooper's statement, however, reveals no conditional promise that appellant's imprisonment sentence would be suspended but only a suggestion that probation remained a feasible possibility". That position is untenable for the reasons previously stated, and for the further reason that the Court's subsequent conduct in twice giving its imprimatur of approval to the specific program embarked upon by Birnbaum and the charities demonstrated that more than a mere exercise was here intended. It also is untenable because, though the word "might" was repeatedly used, that word, in context, could have no proper meaning other than that probation would follow *if* Birnbaum pursued the charted path. Clearly that was the meaning ascribed to it by the charities and the experienced jurists acting for them. It would be a whimsical and thus an invalid sentence (*Butler* v. *District of Columbia, supra*) if it were to be construed, as suggested by the Court of Appeals, as meaning that the trial court "might" or that it just "might not" grant probation, irrespective of what Birnbaum did. Moreover, any construction other than that of conditional promise would raise the question as to whether the trial court acted lawfully in enticing Birnbaum to expend the time and effort he did during a period when he was to be free of restraint pending appeal. Use of the discretionary sentencing power of the trial court, as a way to pressure a defendant to follow a certain course of action by punishing him with a more severe sentence if he does not, has been condemned as an abuse of the trial court judge's discretion. *Thomas* v. *United States,* 368 F.2d 941 (5th Cir., 1966); *United States* v. *Wiley,* 278 F.2d 500 (7th Cir., 1960). Here, however, a

> "If those who are to be reformed cannot implicitly rely on promises or orders contained in the suspension of sentences then we may well expect the law to fail in its purpose. Reformation can certainly best be accomplished by fair, consistent, and straightforward treatment of the person sought to be reformed." *State* v. *Zolantakis,* 70 Utah 296, 259 p. 1044, 1046, 54 ALR 1463 (1927).

Where, as here, the public is enlisted to aid in a judicially sanctioned program it is similarly entitled to such "fair, consistent, and straightforward treatment". Moreover, that the sanctity of judicial promise is to be given the widest possible latitude and, indeed, that the defendant need not even be the one directly benefited by the promise is now clear. *Hassell* v. *United States,* 287 F.2d 646 (9th Cir. 1961). Here not only Birnbaum but the charities unquestionably believed that a promise had been made to them; the charities welcomed the opportunity to be of aid to the Court and to avail themselves of Birnbaum's assistance; they invited Birnbaum to become immersed in their programs and problems and, pleased by his effective help, they

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way, apparently, was sought to be found (through use of the conditional term "might") to avoid that problem.

Second, the Court of Appeals found that an enforceable conditional promise was not stated because " . . . Birnbaum did not lose any basic rights by following the advice of Judge Cooper". As previously observed, that view is untenable for various reasons, if only the fact that by following the advice Birnbaum gave up the basic right to remain free of restraint pending appeal and, in addition, gave time, effort and money to entities and under circumstances not of his own choosing. Moreover, as viewed by the charities such an argument is disengenuous. Certainly, the charities benefited tangibly from Birnbaum's efforts; but their respect (and that of the many they serve) for the integrity of the judicial process, their regard for the sanctity of the judicial promise and their willingness again to be thus used is the true standard of measurement, and against that standard the administration of justice and the public interest paid a shocking price. To them and to society, at least, the fair administration of justice must mean something more than a "calculated risk" that right "might" be done.

permitted many of their future programs to be planned in reliance upon his continued participation therein as the Court had led them to believe would be the case. Elementary principles of justice and fairness mandate that the reliance thus placed in the honor of the Court be now enforced by this Court in the exercise of its supervisory power.

C. *The Remedy.*

It is now well settled that this Court has such supervisory control of the District Courts as is necessary to the administration of criminal justice in the federal courts. *E.g.: Saldana* v. *United States, supra; Yates* v. *United States,* 356 U. S. 363, 366 (1958); *Fay* v. *People of State of New York,* 332 U. S. 261, 287 (1947); *McNabb* v. *United States,* 318 U. S. 332, 340, 341 (1943).

It is equally well settled that, as to the scope of such power, "[t]he sole common denominator of its usage is a desire to maintain and develop standards of fair play in the federal courts more exacting than the minimum constitutional requirements of due process." *The Judge-Made Supervisory Power of the Federal Courts,* 53 Geo. L. J. 1050 (1965). Stated otherwise, but to the same effect, "[s]o long as the 'error' violates the Court's standards for conducting judicial proceedings, reversal will usually follow even though the effect on the particular litigant may have been inconsequential or non-existent. Where there was prejudice to the litigant, he is relieved of the need to demonstrate it; where there was none, he becomes the beneficiary of a gratuitous reversal of an unfavorable verdict [or decision] because the judicial proceeding happened to be improperly conducted." *The Supervisory Power of the Federal Courts,* 76 Harv. L. Rev. 1656, 1657 (1963).

With the "fair administration of justice",* "fastidious regard for the honor of the administration of justice"** and the maintenance of "civilized standards of procedure"† as the sole standards for invocation of the power, this Court has unhesitatingly exercised that power whenever elementary considerations of fairness seemed to call for its invocation.

Thus, in *Thiel* v. *Southern Pac. Co.*, 328 U. S. 217 (1946), the power was invoked to reverse the trial court where the sole vice was the method of jury selection and wholly without regard to whether petitioner was in any way prejudiced thereby. In *Offutt* v. *United States, supra,* this Court held that where the trial judge had engaged in partisan or otherwise unbecoming judicial behavior, supervisory power should be invoked to order a new trial before another judge, Justice Frankfurter stating: "The question with which are concerned is not the reprehensibility of petitioner's conduct and the consequences he should suffer. Our concern is with the fair administration of justice." 348 U. S. at 17.

Supervisory power to assure even-handed justice was invoked by this Court in *Saldana* v. *United States, supra,* under somewhat similar circumstances to those here present—i.e. where a promise was at least implicitly made††

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* *Offutt* v. *United States,* 348 U. S. 11, 17 (1954).

** *Communist Party* v. *Subversive Activities Control Bd.,* 351 U. S. 115, 124 (1956).

† *McNabb* v. *United States,* supra 318 U. S. 332, 340.

†† Significantly, the trial judge did not there unequivocally promise the lesser sentence but merely inquired of counsel for defendant: "Would you like to have me make it five years on each Count and to run concurrently and waive time right now?" That such statement did not constitute an unequivocal promise is also demonstrated by the fact that the trial judge, at the government's request, deferred imposition of sentence until after the co-defen-

of a lesser sentence, only to be dishonored thereafter. There, defendant pleaded guilty to two counts of a five count narcotics indictment. At sentencing, the trial court stated that it would impose a five year sentence. However, upon the Government's objection to the imposition of sentence at that time (since a co-defendant was scheduled to stand trial within a few days), the trial court withheld sentencing, but reassured defendant that the Court would keep its word and impose the five year sentence. The trial of the co-defendant did not proceed and another judge was assigned to impose the sentence. Upon hearing about the earlier proceedings, the second judge decided not to accept the guilty plea because, in his judgment, it smacked of plea bargaining and indicated that he would not consider himself bound by the first judge's statement. Counsel for defendant requested that the case be re-assigned to the first judge and that application was denied. Thereupon, the defendant stood trial and was convicted and sentenced by the second judge to twenty years. The Ninth Circuit affirmed. This Court granted certiorari and set aside the sentence holding:

> "During oral argument in this Court the Solicitor General suggested that the combination of circumstances in this case, beginning with one judge's clearly expressed intention to impose a five-year sentence, and ending with another judge's imposition of a twenty-year sentence under the indictment, was not consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts. In light of the Solicitor General's sug-

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dant had been tried, thereby, arguably reserving to himself the right then to re-assess the situation. Thus viewed, the circumstances of *Saldana* are strikingly similar to those of this case as viewed by the Courts below.

> gestion, and upon an independent examination of the record, we have concluded that a due regard for the fair administration of justice requires that the convictions under counts 3, 4, and 5 of the indictment be set aside." 365 U.S. at 647.

The circumstances of this case compel invocation of this Court's supervisory power. Here a tentative and invalid sentence was imposed and from that vice there were spawned practices which were equally invalid and offensive, not merely to the defendant, but to the administration of justice and to the public at large. Whatever else may be said, the trial court dangled before Birnbaum (and others) the promise, if not the fact, of probation to persuade Birnbaum (and others) to follow a desired path; Birnbaum (and others) followed that path with the knowledge and acquiescence of the trial court; the promise then was affirmed and reaffirmed by the trial court; and the trial court then whimsically ignored its promise without affording the third parties—the charitable and social service organizations—which it had involved in this program an opportunity to be heard and without ever determining that Birnbaum had in any way, shape or form failed to meet his obligation. It cannot seriously be contended that such conduct is consistent with the fair administration of justice, that it honors the administration of justice, that it is consistent with the maintenance of civilized standards of procedure and that it will enhance respect for the law. Without more, invocation of the Court's supervisory power to reverse the order of commitment and to formalize the probation is mandated. In that regard we should, again observe that such a direction would not permit the defendant to escape punishment. Probation is in itself a form of punishment, particularly where, as here, it calls for

the defendant to perform affirmative acts to demonstrate his continued good conduct and to affect his rehabilitation. E.g. *Toyosaburo Korematsu* v. *United States, supra,* 319 U.S. 423, 434-35. Hence our plea for a direction that the punishment here to be imposed be that which was committed by the trial court at sentencing and which the trial court then expressly indicated, under the circumstances of this case, was the appropriate punishment for this defendant, namely *probation.*

CONCLUSION

FOR EACH OF THE FOREGOING REASONS, IT IS RESPECTFULLY URGED THAT FUNDAMENTAL FAIRNESS, THE INTEGRITY OF THE JUDICIAL SYSTEM AND EVEN-HANDED JUSTICE DICTATE THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION OF THE SECOND CIRCUIT AND THAT PETITIONER BIRNBAUM'S PROBATION SHOULD UPON REVIEW BE FORMALIZED.

December 11, 1968.

Respectfully submitted,

WILLIAM J. VANDEN HEUVEL AND
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Attorneys for Petitioners—Amicus Curiae, St. Augustine's Episcopal School, et al.
61 Broadway
New York, New York 10006

APPENDICES

APPENDICES

APPENDIX A

[Letter dated December 22, 1967 from Dr. Sidney Marks, Executive Director, United Cerebral Palsy Association of Nassau County, to Judge Irving Ben Cooper]:

"Dear Judge Cooper:

I take the liberty of writing to you to express my deep concern for Saul Birnbaum.

I have just learned that your Honor has denied Mr. Birnbaum's application to suspend the service of his sentence. I feel that those of us with whom Mr. Birnbaum has worked during the past year and a half have somewhat been remiss in adequately apprizing your Honor of the nature of Mr. Birnbaum's endeavors in our behalf and the character of the man himself as I have come to understand him.

I am fully aware that Mr. Birnbaum has been convicted of a crime. However, I very strongly feel that his confinement in prison would severely retard his personal rehabilitation and result in serious loss to those of us intimately involved in the rehabilitation of the thousands of young human beings who need our help.

We in Cerebral Palsy deal with rehabilitation—with trying to equip and prepare the handicapped for at least limited usefulness to themselves and society. Because we believe in the concept that to make life meaningful is as important as—indeed in many instances more important than—life itself, we dedicate ourselves to the backbreak and the heartbreak of our work to salvage the body, train the mind, and bolster the spirit of the multi-handicapped.

Saul Birnbaum for more than a year has deeply involved himself in our efforts in behalf of cerebral palsied children and adults. Your admonition to Mr. Birnbaum—opening, as it did, new and to him unknown vistas of communal service—initiated a program of rehabilitation for Mr. Birnbaum so effective, imaginative and novel that it has commanded the respect and enthusiastic endorsement of those of us who have come to know of it.

It is my sincere belief that the whole of the story of Mr. Birnbaum's communal efforts have not been told to your Honor. I, for instance, know that no one has ever approached me nor anyone at the Center, to learn from us those facts which I am sure your Honor would want to know about Saul Birnbaum's endeavors during the past year or more; the knowledge of which facts I am sure your Honor would consider important in the making of a determination.

You have provided living proof, Sir, that there are no obstacles which cannot be overcome to restore a person as a resource to the community. I most respectfully urge you to reconsider your most recent decision [and] to permit the continuation of Mr. Birnbaum's rehabilitation process, to his and the community's immeasurable benefit. I ask your Honor to consider what Saul Birnbaum has already done and can do, for us.

No consideration of the effectiveness and the wisdom of your Honor's prescription for rehabilitation can be complete unless it includes our experience with Mr. Birnbaum at Cerebral Palsy. With his guidance, through his foresight, imagination, and because of his deep concern with our problem, we are moving toward our goal when the handicapped and their families will have been relieved of one of the greatest sources of their anguish.

When Saul Birnbaum first came to our center, he met many of the parents whose daily lives are affected

by the pain and the suffering of their cerebral palsied children. Birnbaum spoke to these parents, and quickly recognized that the heaviness of their hearts and their day-to-day anguish, however, terrible, was less than their overwhelming concern for the future of their handicapped children. Somehow, they felt they could cope with the present, and so long as they lived, somehow provide for the care of their youngsters. But they are overwhelmed by the contemplation of the future. Too often we hear the heartbreaking question, 'What will happen to our children when we are gone? Who will take care of them?' The brutal fact is, Judge Cooper, that nowhere is there a full-time residential care facility for the cerebral palsied.

Saul immediately suggested, fully committed, and pledged himself to the establishment of a full-time residential and treatment center for palsied orphans. At once he set in motion the machinery to plan and build the necessary residential center for these tragedy-stricken people. He has devoted countless hours to this task. The program embraces a new center that will provide for the social, medical and rehabilitative needs of the palsied. So diligent has his work on this experimental program been, that we are already close to the start of construction.

We sincerely believe that this center will be a model for the entire country. For the first time, the multi-handicapped will face the future without fear of total abandonment.

In addition to the residential center, Saul has devoted considerable time to the expansion of our medical wing. Our Medical Center is a key portion of our facilities. We are planning a major expansion of this medical wing, with provisions for added staff and patients.

Despite the many problems and tensions of this past year, we have made significant advance in the area of

attaining financial security. Much of this progress has been a result of Saul Birnbaum's direct efforts. His studies of the problem and his recommendations have proven invaluable. The demands upon Saul's time have been great; there have been frustrating and innumerable committee meetings, phone calls and conferences, which only a charity can command and the charitably-inclined can provide. Saul Birnbaum has given unstintingly of himself in this endcavor. He assumed the chairmanship of our Journal, which has just come to a successful conclusion. The funds raised through his efforts are making it more possible for us to do our job at Cerebral Palsy.

I am sure that when your Honor reviews Birnbaum's massive effort in our behalf—the establishment of the residential center, expansion of our Medical Wing, creation of a program for endowment funds, and his contribution of time and money to help solve our financial problems, you will agree with me that Mr. Birnbaum is a man not only of ability, but of true compassion and dedication.

It would be impossible for me to recount all that Saul Birnbaum has meant to us. The road, of our cerebral palsied and their families, is a long and hard one to travel, but the goal makes the difficult journey worth while. I most sincerely ask that you help us by exercising your judicial power with compassion, and permit Saul Birnbaum to *continue* his good work with us." (Emphasis supplied).

APPENDIX B

[Letter, dated December 21, 1967, by Father W. G. Henson Jacobs, Principal of St. Augustine's Episcopal School, to Judge Irving Ben Cooper]

"Dear Judge Cooper:

It is with a heavy heart that I write to you in behalf of our very dear friend, inspirational leader and director—Saul Birnbaum. I write to you as Principal of St. Augustine's and the Past President of the Protestant Council of Brooklyn.

Our school—located in Bedford Stuyvesant—is now offering quality education for hundreds of Negro children. From the depths of poverty, from the brink of hopelessness, many of these youngsters have been encouraged to pursue their education and rise to fine careers and lives.

Children with ability are given the opportunity to learn, which they never would except for this school. They are given the chance that frequently they never would have.

To these ends, St. Augustine's has dedicated itself. We are recognized as an excellent school, doing a very significant job in a community that truly needs help of this type.

Against this setting and during a period of very great stress at our school, we met Saul Birnbaum. It was approximately a year and one half ago, when Saul visited our school—then located in the YMCA at 55 Hanson Place. He exhibited an unusual awareness of the social and educational problems that confronted youngsters from our environment.

That first day, he visited with virtually every teacher in our school. He spent a number of hours in the classrooms. He chatted with our students, young and old.

He asked them about their reading their interests and their studies. At the outset, I was greatly impressed with his desire to probe—to understand—and to assist us.

At the end of his visit, Saul said, "I want to be of help. What can I do?"

With this offer—a new chapter began in the history of our school. Judge Cooper, you must know of the events that have transpired, because only then can you evaluate the tremendous time, energy and guidance that Saul has given and may continue to give to us. He is a charitable man. But beyond mere charity, he is a socially conscious man who is giving without stinting of his time and energy.

Our foremost problem at that time—as it is today—was to plan a permanent home for our school. When we were founded, we were located in our church building at Marcy and Lafayette Avenues. As the community learned of our work, the demands for entrance grew so rapidly, that we were forced to take temporary quarters at the YMCA. Here, too, the size of our student body has continued to grow.

Saul saw our church quarters and the YMCA facilities. And he advised us that the 'Y' quarters—while excellent in terms of mass transportation—were poorly laid out, difficult to supervise and not suitable for expansion.

He set forth a plan, by which we would start to scour our neighborhood for a suitable building of our own. It was evident to us that his background as a realtor and financier would be of immense value to us and our children.

The problem became still more acute a few months later when we were notified that the State of New York was acquiring the YMCA building for use as a narcotics rehabilitation center.

We held a number of emergency meetings with Saul. He advised us to seek permission to complete the

school term at the YMCA without interruption. He then created a "team" of professionals—architect, attorney and himself—that joined with a group of parents and teachers from the school, to hasten our search and evaluation concerning the new building.

A number of potential sites were considered. Saul visited each and every one of them with me. At first we found a catering hall that appeared suitable. But the renovations and mortgage charges appeared far beyond the scope of our income. We visited abandoned commercial buildings and a theatre that was placed on the market.

Saul spent days—literally days—in driving through Bedford-Stuyvesant with me. He was quick to spot massive defects in the buildings that we contemplated, many of which I could not see. Yet he did not permit us to panic. The YMCA situation ended and we moved to temporary quarters once again. Despite this, our enrollment was high. The educational environment in this space is poor, but through Saul's encouragement, we notified the parents and the children alike that this would be a stop-gap situation—that we would soon have our own facilities.

Several weeks ago, we located a large building that is being used by the Arion Club on Bushwick Avenue in Brooklyn. Saul visited the building a number of times. Once with an architect, who has prepared plans for a complete modernization of the structure. (Parenthetically—this was the second full set of plans that Saul had prepared. A prior set was devised for another building, which proved to lack many of the ingredients we required).

The following week, Saul took a builder to the structure—impressed upon him that this was a vital job for the school—and had this builder provide us with a rough cost analysis and opinion concerning the building.

Saul also met with our parents' group, and outlined a course of procedure for us to follow in acquiring the property, and erecting an appropriate structure thereon.

Negotiations are presently under way. With Saul's active guidance and participation, we hope to bring this project to a successful conclusion in the near future.

We will have a building that is well located and suitable for the purpose of our school. It has a large gymnasium-auditorium; sufficient rooms for classrooms to accommodate 400 students; good kitchen and other facilities. We plan to establish a pre-school nursery class too.

Without a doubt, if Saul Birnbaum had not been helping us during these trying times, we would not be at the point where our future seems secure. He has been a tower of strength and has used his time unsparingly in our behalf.

But let me discuss other aspects, too, of his work. At the very beginning of our relationship, he asked if there were any very needy, yet extremely talented children at our school—children who really required financial aid to continue. He met with a number of them and established an annual scholarship. The Amsterdam News singled out this award for attention.

Saul also exerted efforts to try to create a school dropout program, under which we would take in a number of school dropouts for special educational training. At the same time, they would be assisted by us in getting part time jobs, so that they would work and study at the same time. He put us in contact with a number of people and we are in the process of seeking to develop this program with the help of Federal Poverty funds.

Saul helped us with our camp. As you may know, we operate a summer camp for poverty children. These are youngsters who have never seen the beauty of the countryside green. We give them a summer of fun at

our own camp. Saul met with the camp committee a number of times. He is currently outlining a program by which we will expand our service by contacting other camping groups in an effort to have them take additional children from our school at their camps. We cannot devote full time to the camping program, and Saul thinks we may be able to interest other groups devoted exclusively to camping operations, to help us increase the numbers of youngsters that receive summer vacations without charge.

Our Board of Directors was so impressed with Saul's efforts that we voted him our "Man of the Year". This award was presented to him at our graduation ceremonies this past June. At that time, Saul presented medals to the outstanding students and delivered a very touching speech to our children. *His name and his activities serve as symbols of promise to our students, teachers and parents.*

Saul also arranged for the Brooklyn Philharmonia to provide hundreds of free tickets to our children for their children's concert series. You would have been thrilled to see the looks of joy and excitement on the faces of our children.

The list is endless. Any charitable organization that can have the unusual talents of a Saul Birnbaum to help it, has a vast reservoir of strength.

We feel that your honor would want to know this. *We wanted you to know that we are distraught over the decision and are praying that he may be spared to continue his work. We are so desperately in need of his advice and assistance. If we do not now conclude the transaction for our new building, we will forever lose the opportunity. We rely so heavily upon Saul.*

If you send him to prison, our school plans will collapse. Our fond hope of many years will again become a frustrating hope instead of reality.

We pray that through this letter you will come to understand his role with us.

I implore you to meet with me. I would be pleased to discuss this situation with you at very great length. Our entire community has a very real and heartfelt concern for our friend, Saul Birnbaum.

With humility and with hope, I remain,

Very truly yours,

The Rev. W. G. Henson Jacobs"
(Emphasis supplied)

APPENDIX C

[Letter, dated December 22, 1967, from Rabbi Morris Schmidman, Dean of Hillel School of the Shore Area, to Judge Irving Ben Cooper]

"Dear Judge Cooper:

I fervently pray that you will give your compassionate consideration to this must heartfelt plea on behalf of Saul Birnbaum.

When you recommended that he apply himself to works of charity, you bestowed upon our school a unique blessing. The insight that you so graciously made manifest by this directive was a noble expression of our prophetic tradition of righteousness, charity and compassion.

Has he failed to heed your admonition? Was his work for our school too begrudging? Did he not make the efforts and sacrifices which would vindicate him in your blessed judgment?

Your Honor, I beg you to consider the faithfulness with which your suggestion has been followed and the eternal good that has resulted from it. The Hillel School, founded seventeen years ago, is an educational institution dedicated to our American culture and Jewish heritage. I am the Dean of the School and am responsible for its day-to-day functions and administration. I know intimately that were it not for the dedicated help of Saul Birnbaum in this past year, the existence of this school would have been in serious jeopardy.

Our school is not large, except in spirit. We have a vision of youngsters growing to manhood as fine citizens with religious convictions. They will be good men and women, good fathers and mothers, good neighbors and citizens. We have not completed every stage of this journey, but we labor to accomplish this ideal.

Saul Birnbaum is really and truly helping us in these endeavors. It is not easy to speak of Saul Birnbaum's work for us in conventional terms. Let me first give you my impression of Saul. His humility is profound and sincere. His bearing is modest. But we immediately become aware that we have in our midst a remarkable person. With his insight and concern he quietly forces us to think differently of our efforts. His gentle and self-effacing manner and his earnestness, convince me that his efforts on behalf of the school mirror the attributes of good citizenship in their noblest quality. He is a dutiful son to his mother, now old and helpless. You may well ask, is this really a true judgment? *I am convinced by instinct and by personal association that Saul Birnbaum is now motivated by the essence of the charity that you described in your April decision. It moved him deeply and made him truly a part of us.*

When he first came here he asked me many questions. He told me that what he had seen and heard at the Hillel School moved him to lend his full support and effort. This he has done, and done so completely and sincerely that he has now become a vital part of our future.

For Saul Birnbaum our small school looms very large indeed. He concerned himself immediately with the safety and comfort of our student body. He spent days in the study of our physical structure. Saul insisted that important construction work be instituted on new classrooms and improvements to the library. We have now undertaken this work.

Hebrew day schools are tragically underfinanced. I should not confine it to our Hillel school. I guess it is generally true. Business has certainly never been my strong point. I was therefore happy when Saul Birnbaum looked into our financial picture. Saul met with me and our Board, which he joined as a member. He accepted the chairmanship of our development pro-

gram, starting with his own generosity. It was not a chairmanship in name only. It was work and plans and aggravation and understanding for untold hours. We are finally moving in the right direction, to solvency.

He was concerned with our dinner and our other fund raising efforts and led the way with his advice and participation on a regular basis.

Saul Birnbaum is not only concerned with our present program, he is also the big hope for the future for myself and our students.

I cannot conceal my deep emotion and disappointment on the reflection that this man whose mind has lit up our future and who has spent so much time in loving concern for our Hillel school might be taken away from us. He came to us with a contrite spirit and a willing heart and hand. I have great fear that all the good you have done to motivate him in behalf of charity work may be destroyed by the sentence. He has tried and accomplished much in a truly sincere effort. Let him stay with us, I beg of you.

Judge Cooper, I feel a special intimacy with you on this because we have already received so much help by what you did. I also feel that nothing but harm can be achieved by execution of the sentence.

We would be filled with deep gratitude if you, with your great understanding, would reconsider the sentence of Saul Birnbaum and let him continue to be with us. Let his wonderful talents continue to work for us and help us build a future for our youth. I shall deem it a privilege to sit with you and discuss this matter further.

With your help we hope to continue to be a bright beacon to our youth and successfully travel the road to more enlightening contributions to society.

Sincerely yours,

MORRIS SCHMIDMAN
Rabbi and Dean"
(Emphasis supplied)

APPENDIX D

[Letter, dated December 22, 1967, from Family Court Judge (now Supreme Court Justice-elect) Maurice Bernhardt, President of the Pride of Judea Children's Services, to Judge Irving Ben Cooper]

"Dear Judge,

I am the President of the Pride of Judea Children's Services, an agency that has served the children of our city for over 50 years.

I write to tell you of my warm feelings toward Saul I. Birnbaum, a most valued and respected member of our Board. *He is a kind, compassionate and generous human being. I say this to you, with full awareness of the circumstances which have brought Mr. Birnbaum to his present plight.*

He has met with me in my chambers and has come to many conferences at the Pride. I am profoundly impressed with his deep dedication and devotion to our work. He has developed an understanding of the urgency of mental health problems and is filled with compassion for the families and children whom we serve.

With Mr. Birnbaum, it has been my experience that no task is ever too small or too great for him to tackle and he has devoted a major portion of his time to us on a continuous basis. Our organization's outstanding men and women, have great regard for Mr. Birnbaum and find him almost indespensible as a leader and supporter of our very important service.

It would indeed be a tragedy for our children if Mr. Birnbaum's efforts were interrupted. His confinement would remove one of our most ardent supporters and deal a terrible blow to our programs. I do not refer to Mr. Birnbaum's financial generosity alone. I refer

to his active participation, guidance and wisdom in helping us plan for the future.

One case in point, is Saul's creation of our special "School Phobia Program". Many months ago Saul visited the Pride Building, he met with the staff, and observed the scores of deeply disturbed and troubled children struggling to find their way back through the deep shadows of mental illness.

Saul was visibly impressed by one very real and growing problem. There are thousands of children who, for one reason or another develop a phobia to school. Their fear is so intense that they refuse to attend school; many seek to hurt themselves and inflict serious physical damage to their bodies to avoid school attendance.

Long periods of time elapse and their troubles worsen. The child is suspended from the Public School system and before long become trapped by a very serious emotional problem compounded by a total lack of education.

Saul was deeply touched. He asked what could he do for these school phobic children. He wanted to help. And help he did. He established a new program for these children at the Pride of Judea. This unique program in conjunction with the Pride of Judea Clinic and School encourages the disturbed child to resume his studies under carefully supervised, warm and understanding surroundings. Specially trained teachers offer him a helping hand, enabling the child to find his way out of the darkness. We dedicated these special classes to Saul and named the program after him.

Because of Saul's help the children receive individual therapy and small personalized classroom experience. After a long period of this intensive therapy some of the children are already able to attend Public School, accompanied by their "Pride" teacher for about 1 hour a week.

It would be a great loss to the Pride of Judea as well as to these children and their parents if this wonderful program were curtailed.

Throughout the long history of our agency, men like Saul Birnbaum have given of their time and energy to build this wonderful institution. Saul is certainly carrying on in this great tradition.

Pride was organized as an orphan home, but since 1959 we provide the full spectrum of psychiatric services for children and their families.

Our annual budget is $640,000 and we provide these services: 1) Child Guidance Clinic, which is concerned with the diagnosis treatment and prevention of emotional problems in children and their families.

Our case load is enormous and our waiting period is about 1½ to 2 years. To cope with this situation the Pride expanded its range and extent of services and instituted a rapid intake system; family treatment; group psychotherapy; joint counselling; play therapy; individual psychotherapy; individual counselling; group counselling; family interviewing. Mr. Birnbaum's efforts in these areas enabled us to expand these programs rapidly.

We have professional affiliations with Columbia University and New York University Schools of Social Work and with Yeshiva University Schools of Special Education. All three assign students for study training at the Pride.

This important recognition of our high standards permits us to actively participate in the training of graduate students and to help create a reservoir of professional talent for future staff.

2) The Pride School and Treatment Center for Seriously Emotionally Disturbed Children is a day school which is treatment and research oriented.

The children in our school come from all neighborhoods. They are representatives of 500,000 such chil-

dren in the United States. For every child in the school there are thousands waiting in their homes.

Judge Cooper you can help us. We need Saul Birnbaum and his ever present aid and advice. We need his dedication and ability. The children also look to you for your help. Saul Birnbaum's confinement would profoundly affect all those who desperately need his help. I feel so strongly about this man, that I implore you to reconsider. I would gladly put aside all of my commitments and meet with you any time at your convenience for further discussion of this problem.

Sincerely,

HON. MAURICE BERNHARDT
President"
(Emphasis supplied).

APPENDIX E

[Letter, dated December 23, 1967, from Arthur Gottlieb, Vice President of the Menorah Home and Hospital for the Aged and Infirm, to Judge Irving Ben Cooper]

"Dear Judge Cooper:

I am writing this letter as a vice president and director of the Menorah Home and Hospital For The Aged and Infirm.

In April 1966, Supreme Court Justice Louis Heller introduced me to Saul Birnbaum with the hope that some very significant philanthropic effort could be developed in behalf of Menorah.

The Home is one of the country's truly outstanding centers for the aged—providing pioneering efforts through its day center, its psychiatric clinic for the aged, its hospital and its residence. A total of 1,000 aged persons receive help at Menorah. The Home was founded in 1909 and has been a leader in developing new concepts in care for the aged.

Menorah has been hailed by Presidents, Governors and Mayors and works closely in training and research programs with various universities. The home is held in high regard in professional and philanthropic circles.

As you well know, raising sufficient funds for the home is one of the major problems confronting this institution as every other such facility. Each year a great effort must be undertaken to meet the increasing costs of labor, supplies, renovations and new facilities.

This year, Menorah planned and executed its most successful dinner and journal in its long history. One of the main reasons was the superb efforts of Saul Birnbaum.

Initially, Saul visited the home and studied its operations. He spoke to our residents and to our staff. He

familiarized himself with our problems and programs and plunged into a continuing effort to help our aged.

Saul accepted our invitation to become chairman of our journal committee. This entails a very large responsibility. And he shouldered that responsibility. Saul attended a series of approximately 25 meetings and cocktail parties and organized a successful fund drive for Menorah through our 1967 Journal.

He helped plan the journal format and ad blanks. He prepared lists of new names of possible contributors. These names ran into thousands. They covered virtually every field of endeavor from labor union leaders to manufacturers, from stock brokers to attorneys.

He then helped create a large committee of people who participated in the fund drive. He worked closely with them as chairman.

Saul personally contacted hundreds of individuals. He met with many of them and wrote to them. He called and cajoled and succeeded in raising a very large sum of money for the home. He used his personal contacts to enlarge the home's group of supporters.

His advice was invaluable and our future drives will undoubtedly benefit greatly from the new directions and enthusiasm which he gave to us as well as from the great number of new supporters whom he brought to us.

Two valuable concepts were encouraged and developed by him during his association with Menorah. One, that a large number of small donors is essential to the success of any institution; by encouraging the less affluent to participate in its development they become an integral factor and provide a strong and enduring base for the organization. Make the "small giver" feel important! Two, interest young people in the activities of the Menorah Home and Hospital.

As soon as the 1967 annual dinner and journal campaign was over, Saul had already embarked on the 1968 journal drive.

In addition, Saul's knowledge and technical ability in the nursing home field, as well as the areas of finance and administration undoubtedly could prove to be of extreme value to the home on a long term basis.

He has volunteered to assist me in my role as a vice president in the home in regard to long range fiscal planning for our institution, and I consider this of great value.

It has been a pleasure working with Saul Birnbaum. Whenever we had a problem, Saul was there. He wasn't a "sometimes show" personality. He was constant in his devotion and energy and is a fine example for other charity minded persons.

In view of his invaluable work through our Journal, Annual Dinner and counsel to me, were he to be removed from his active participation, there would be a genuine loss to this agency.

I would be pleased to meet you to discuss this matter.

Sincerely yours,

ARTHUR GOTTLIEB
Chairman of Dinner and
Year Book"

APPENDIX F

[Letter, dated November 13, 1967 from Appellate Division Justice George J. Beldock, President of Brotherhood-In-Action, to Judge Cooper]

"Dear Judge Cooper:

I take the liberty of addressing you on behalf of the above named defendant.

May I state at the outset that in my twenty years on the Bench I have never written to a sentencing Judge, and, on but one occasion have I telephoned in connection with a matter of sentencing.

I do so in this case as I believe it to be justified by the unusual circumstances of your statement made at the time of sentencing, as well as his subsequent conduct and activities, of which I am personally aware.

Judge Heller has been my close and intimate friend since our boyhood days. We were brought up in the same neighborhood, and throughout the years, up to the present time, have enjoyed a warm association as social friends, lawyers and as judges. We have served together in many fraternal, civic and charitable causes. Judge Heller is a very valuable and active member of the Board of Brotherhood-In-Action which, as you may know, I founded twenty-five years ago to deal with racial, religious and intergroup tensions.

When Judge Heller originally discussed with me the desire of this defendant to become an active participant in the human relations work of Brotherhood-in-Action, *he made full disclosure of the defendant's background.* It was not until I had met and talked with Mr. Birnbaum at great length that I made the judgment that he was an unusual and talented person who merited the chance to prove to us his sincerity of purpose and dedication to causes above and beyond his own personal interests.

I thereupon decided to afford him the opportunity, through Brotherhood-in-Action, *to demonstrate whether he could fit into the structure and pattern of your outline of 'rehabilitation' so poignantly expressed at the time of sentence.*

May I say that I consider your approach in this case to be a pioneering, novel and humane one—truly in the best tradition of our new concept of sentencing psychology.

Although I had never been confronted with this type of situation *I must say this also presented somewhat of a challenge for me, for our cause, and for society in general.*

I think it proper to report to you upon the results which I am pleased to say completely justified my initial judgment of the man. He has served Brotherhood-in-Action well, was available often and displayed genuine and sincere interest in our work and the development of more useful programs to further our cause. This—beyond and above the assignments allotted to him.

His deep interest in our programs and his willingness to serve and to contribute of his time, effort and resources have been most gratifying. Having observed his selfless zeal in our work and the sincere manner of his conduct and his endeavor to serve his fellow man, I venture to predict that if permitted he will continue throughout his lifetime to take this type of genuine interest in causes such as ours, and others, which seek to alleviate the suffering, the impoverished, the underprivileged and the disadvantaged in our communities and in the nation.

With warm personal regards, I am

Respectfully yours,

GEORGE J. BELDOCK"
(Emphasis Supplied)